

No. 12,423

IN THE

United States Court of Appeals
For the Ninth Circuit

EMIL NEWMAN,

Appellant,

VS.

THE STATE OF CALIFORNIA, THE CITY &
COUNTY OF SAN FRANCISCO, EDMUND
G. BROWN, MARSHALL E. LEAHY,
FRED N. HOWSER, JESS HESSION, L.
LESLIE VOGEL, ELMER E. ROBINSON,
et al.,

Appellees.

BRIEF OF APPELLEES
CITY AND COUNTY OF SAN FRANCISCO
(A MUNICIPAL CORPORATION), AND
ELMER E. ROBINSON.

DION R. HOLM,

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and Elmer E. Robinson.*

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Subject Index

Page

| | |
|--|---|
| Jurisdiction of the Federal District Court..... | 2 |
| The District Court lacked jurisdiction over the subject matter, and appellant failed to state a claim upon which relief could be granted | 3 |
| Under the allegations contained in the complaint it also affirmatively appears no constitutional guarantees of appellant violated by actions of answering appellees..... | 5 |

Table of Authorities Cited

| Cases | Pages |
|---|--------------|
| Ex parte Paresky, 54 S. Ct. 3, 290 U.S. 30, 78 L. Ed. 152. . . . | 4 |
| Hardware Dealers Mutual F. Ins. Co. v. Glidden Co., 284 U.S. 151, 76 L. Ed. 214, 52 S. Ct. 69. | 6 |
| Levering and Garrigues Co. v. Morrin, 53 S. Ct. 549, 289 U.S. 103, 77 L. Ed. 1062; affirming 61 F. (2d) 115, certiorari granted 53 S. Ct. 118, 287 U.S. 590, 77 L. Ed. 515. . . . | 4 |
| Toncray v. City of Phoenix, 47 F. (2d) 448. | 4 |
| Worcester County Trust Co. v. Riley, 58 S. Ct. 185, 302 U.S. 292, 82 L. Ed. 268, affirming 89 F. (2d) 59. | 5 |

Constitutions

| | |
|---|------|
| United States Constitution, Fourteenth Amendment. | 3, 4 |
|---|------|

Statutes

| | |
|---|---|
| California Code of Civil Procedure, Sections 430-434. | 6 |
| 62 Stat. 930, c. 646 | 2 |
| 62 Stat. 932, c. 646 | 2 |
| 28 U.S.C.A. foll. Sec. 723 (c) | 1 |
| 28 U.S.C.A. Sec. 1331 | 2 |
| 28 U.S.C.A. Sec. 1343 | 2 |

Texts

| | |
|---|---|
| 12 Am. Jur. (Constitutional Law), page 273. | 5 |
| 12 Am. Jur. (Constitutional Law), page 280. | 6 |
| 35 C.J.S. (Federal Courts) 913. | 4 |

Rules

| | |
|---|---|
| Federal Rules of Civil Procedure, Rule 12 (b) | 1 |
|---|---|

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**BRIEF OF APPELLEES
CITY AND COUNTY OF SAN FRANCISCO
(A MUNICIPAL CORPORATION), AND
ELMER E. ROBINSON.**

The motion of defendants and appellees City and County of San Francisco, a municipal corporation, and Elmer E. Robinson, to dismiss the complaint was filed under Rule 12 (b), Federal Rules of Civil Procedure, 28 U.S.C.A. foll. Sec. 723 (c), on the following grounds: (1) Lack of jurisdiction over the subject matter; (2) Lack of jurisdiction over the per-

son; * * * (6) Failure to state a claim upon which relief can be granted. The order granting the motion to dismiss the complaint was granted on September 19, 1949, by the Honorable Louis E. Goodman.

JURISDICTION OF THE FEDERAL DISTRICT COURT.

The Federal District Court has original jurisdiction of civil actions under 28 U.S.C.A. Sec. 1331, June 25, 1948: c. 646, 62 Stat. 930, and 28 U.S.C.A. Sec. 1343, June 25, 1948: c. 646, 62 Stat. 932.

28 U.S.C.A. Sec. 1331 provides as follows:

“The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of \$3,000 exclusive of interest and costs, and arises under the constitution, laws or treaties of the United States.”

Section 1343 provides as follows:

“The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States by any act done in furtherance of any conspiracy mentioned in section 47 of Title 8;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 47 of Title 8 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.”

In the complaint filed by appellant in the District Court and in appellant’s brief on appeal it is stated that there has been a violation of the rights guaranteed to him under the Fourteenth Amendment of the Constitution of the United States by the actions of appellees City and County of San Francisco, a municipal corporation and Elmer E. Robinson. In order for the District Court to have jurisdiction concerning the matter, the appellant must show that his case comes within the purview of either of the above-quoted provisions of law.

THE DISTRICT COURT LACKED JURISDICTION OVER THE SUBJECT MATTER, AND APPELLANT FAILED TO STATE A CLAIM UPON WHICH RELIEF COULD BE GRANTED.

In determining whether a complaint presents a federal question within the jurisdiction of the federal Courts, the allegations of the complaint, and not facts which may be developed or the merits of the case, control. A mere statement that a violation of a constitutional guarantee has been perpetrated is not sufficient. The complaint must contain allegations to show how or in what manner a complainant has been denied

any of the rights guaranteed by the Fourteenth Amendment of the Constitution of the United States.

Levering and Garrigues Co. v. Morrin, 53 S. Ct.

549, 289 U.S. 103, 77 L. Ed. 1062; affirming 61

F. (2d) 115, certiorari granted 53 S. Ct. 118,

287 U.S. 590, 77 L. Ed. 515;

Ex parte Paresky, 54 S. Ct. 3, 290 U.S. 30, 78

L. Ed. 152;

Toncray v. City of Phoenix, 47 F. (2d) 448;

35 C.J.S. (Federal Courts) 913.

In 35 C.J.S. (Federal Courts) at 913 it is stated as follows:

“Jurisdiction cannot rest on mere inference, conjecture or argument, but it must appear, in accordance with the rules of good pleading, by positive averments and specific allegations of fact which show clearly and distinctly that a question under federal law is involved. * * * A mere formal statement that the action arises under the constitution or laws of the United States, or that it arises under or involves a particular law is insufficient. The circumstances out of which the federal question arises must be clearly and distinctly stated.”

A reading of the allegations of the complaint demonstrates that appellant has failed to show how or in what manner there has been a denial to him of any constitutional rights or guarantees by the appellees herein.

UNDER THE ALLEGATIONS CONTAINED IN THE COMPLAINT IT ALSO AFFIRMATIVELY APPEARS NO CONSTITUTIONAL GUARANTEES OF APPELLANT VIOLATED BY ACTIONS OF ANSWERING APPELLEES.

Further, as far as the answering appellees are concerned, the allegations of the complaint affirmatively show that neither the actions of appellee Elmer E. Robinson or appellee City and County of San Francisco, by and through the actions of any of its officers or officials, has deprived appellant of any of the constitutional rights or guarantees of the Fourteenth Amendment to the Constitution of the United States or any other of the rights, privileges and immunities guaranteed by the Constitution of the United States.

The adverse decision of a state Court does not violate the constitutional guarantee of the Fourteenth Amendment of due process of law.

Worcester County Trust Co. v. Riley, 58 S. Ct. 185, 302 U.S. 292, 82 L. Ed. 268, affirming 89 F. (2d) 59;

12 *Am. Jur.* (Constitutional Law), page 273.

The guarantees of the Fourteenth Amendment of the Constitution of the United States are not violated by decision of a state Court on a demurrer. The guarantee of due process by judicial action makes essential a hearing and a notice of hearing be given to the parties involved in such action. Proceedings in a state Court long established as regular mode of procedure and of which reasonable notice and opportunity to be heard are given, satisfy the requirements of due process of law. Proceedings upon demurrer have been

a long established and regular mode of procedure in the Courts of California. (California Code of Civil Procedure, Sections 430-434.)

Hardware Dealers Mutual F. Ins. Co. v. Glidden Co., 284 U.S. 151, 76 L. Ed. 214, 52 S. Ct. 69;

12 *Am. Jur.* (Constitutional Law), page 280.

In 12 *Am. Jur.* (Constitutional Law), page 280, the rule is stated as follows:

“The procedure by which rights may be enforced and wrongs remedied is peculiarly a subject of state regulation and control. The due process clause of the Fourteenth Amendment to the Constitution of the United States does not control mere forms of procedure in state courts or regulate practice therein; nor is it designed to reach errors in the administration of the laws not involving jurisdiction of the subject or of the parties. The due process clause does not guarantee to the citizen of a state any particular form or method of state procedure. A state may regulate the procedure of its courts in accordance with its own conception of policy and fairness unless it offends some principle of justice ranked as fundamental, such as the requirements of hearing and notice, or unless it is unreasonable or arbitrary. There is nothing in the Federal Constitution or its amendments that requires a state to maintain the familiar line between the functions of the jury and those of the court.

When a regular course of justice by an efficacious remedy is secured by the law of the state, the constitutional requirement contained in the Fourteenth Amendment is satisfied. It has sometimes been broadly stated that the adjudication of

a person's claims by the courts of his own state is due process of law, that what is due process of law in a state is regulated by the law of the state, that the requirements of the Fourteenth Amendment are satisfied if trial is had according to the settled course of judicial procedure obtaining in the particular state and the laws operate on all persons alike and do not subject the individual to the arbitrary exercise of the powers of government, or that the law of the state is the law of the land. If the state courts have acted in consonance with the constitutional laws of the state and its own procedure, it is only in very exceptional cases that a Federal court will interfere on the ground that there has been a failure of due process. The proceedings in a state court need not be by any particular mode if they constitute a regular course of proceedings in which notice is given of the claim asserted and an opportunity afforded to defend against it."

It is respectfully submitted the motion to dismiss the complaint herein was properly granted.

Dated, San Francisco, California,
May 29, 1950.

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